CLERK'S COPY.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1947

No. 370

FONG HAW TAN, PETITIONER,

vs.

ARTHUR J. PHELAN, ACTING DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE, PORT OF SAN FRANCISCO, CALIFORNIA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED SEPTEMBER 24, 1947.

CERTIORARI GRANTED NOVEMBER 10, 1947.

No. 11447

United States

Circuit Court of Appeals

For the Ninth Circuit.

FONG HAW TAN,

Appellant,

vs.

ARTHUR J. PHELAN, Acting District Director, Immigration and Naturalization Service, Port of San Francisco, California,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division

Rotary Colorprint, 870 Brannan Street, San Francisco

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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On Appeal from United States District Court for Nothern District of California

Decision by Judge Goodman

In the Southern Division of the United States District Court in and for the Northern District of California, Second Division

No. 25492-G

In the Matter of:

FONG HAW TAN,

on Habeas Corpus

S. F. Immigration File No. 12020/7753

PETITION FOR WRIT OF HABEAS CORPUS

To the Honorable, the Southern Division of the United States District Court, for the Northern District of California:

The petition of Fong Haw Tan respectfully shows:

I.

That the petitioner is a native of China, having first arrived in the United States on the Steamship Korea in August, 1910, and was duly admitted for permanent residence by the United States immigration authorities for the Port of San Francisco.

II.

That following his admission by the United States as aforesaid, the petitioner has resided continuously within the United States from said date of entry up to and including the present date.

III.

That the petitioner is now in the custody of I. F. Wixon, [1*], District Director of Immigration and Naturalization for the District of San Francisco, under an Order of Deportation issued by the Attorney General of the United States on November, 1941, which said Order charged that the said petitioner was subject to deportation under the Act of February 5, 1917, in that he was after May 1, 1917, sentenced to a term of imprisonment more than once for a term of one year or more for the commission subsequent to his entry of a crime involving moral turpitude, to-wit, murder.

IV.

That the only time the petitioner has been sentenced to a term of imprisonment because of a conviction in this country of any crime involving moral turpitude was in Fresno, California, on July 21, 1925, when the petitioner was convicted of the crime of murder alleged to have been committed on May 22, 1925. That the petitioner was sentenced to a term of imprisonment for the aforesaid crime on July 21, 1925, and that he served a term in the penitentiary of the State of California and was thereafter paroled.

V.

That the petitioner, as heretofore alleged, entered the United States legally in August, 1910; that the alleged commission of the offense heretofore referred to and the sentence and imprisonment there-

* Page numbering appearing at foot of page of original certified Transcript of Record.

for occurred in 1925, or a period of more than five years after the entry of the detained into the United States.

VI.

That prior to the commission of the alleged offense set forth above the petitioner had not theretofore committed any offense whatsoever involving moral turpitude, nor had he been sentenced to a term of imprisonment because of conviction in this country of any crime involving moral turpitude.

VII.

That, therefore, the petitioner is not subject to the [2] provisions of the Act of Congress above referred to relating to the deportation of aliens who have been sentenced to a term of imprisonment because of a conviction in this country of a crime involving moral turpitude.

VIII.

That pursuant to a hearing held before said District Director of Immigration and Naturalization, said petitioner was ordered to be deported from the United States on or about May 12, 1946, the said deportation to be made on a vessel sailing from the Port of San Francisco on the said date.

IX.

That the hearings and proceedings had therein and the action of the said District Director and the said Attorney General of the United States, ordering the petitioner to be deported on May 12, 1946,

as aforesaid, was and is in excess of the powers and jurisdiction conferred upon them and is in excess of the authority committed to them by the Statutes of the United States in such cases made and provided.

X.

That your petitioner has not in his possession any part or parts of said proceedings had before said District Director for the reason that your petitioner has not been informed of the facts of this case; that the original immigration records, including the Findings and Decisions of the Attorney General, are on file with the said District Director, by reason of which the records are not now available to your petitioner; that your petitioner hereby stipulates that as soon as said records are made available the same may be filed and made a part of the proceedings herein.

XI.

That it is the intention of the said District Director to deport the said petitioner at once and, unless this Court intervenes to prevent said deportation, your petitioner will be unlawfully deprived of his residence within the United [3] States of America.

Wherefore, your petitioner prays that a writ of habeas corpus issue as prayed for, directed to the District Director of Immigration and Naturalization, and directing him to hold the body of your petitioner within the jurisdiction of this Court and to present the body of your petitioner before this Court at a time and place specified in the order, to-

gether with the time and cause of his detention, so that the same may be inquired into to the end that your petitioner may be restored to his liberty and go hence without day; and that the Court release the said petitioner upon his own recognizance during this proceeding. Your petitioner heretofore has been permitted his liberty by the United States immigration authorities on his own recognizance.

Dated: This 10th day of May, 1946.

/s/ THOMAS C. LYNCH,
/s/ WILLIAM J. CHOW,
Attorneys for Petitioner.

[Endorsed]: Filed May 10, 1946. [4]

[Title of District Court and Cause.]

ORDER TO SHOW CAUSE

Good cause appearing therefor and upon reading the verified petition on file herein:

It Is Hereby Ordered, that I. F. Wixon, District Director of Immigration and Naturalization for the District of San Francisco, appear before this Court on the 27th day of May, 1946, at the hour of 10 o'clock a.m. of said day, to show cause, if any he have, why a writ of habeas corpus should not be issued as prayed for, and that a copy of this order be served upon said District Director of Immigration and Naturalization, and a copy of the petition

and said order be served upon the United States Attorney for his District, his representative herein:

And It Is Further Ordered, that Fong Haw Tan, the petitioner herein, be not removed from the jurisdiction of this Court and that he be enlarged on bond in the sum of $1,000.00 pending this hearing and until further orders herein.

Dated this 10th day of May, 1946.

LOUIS E. GOODMAN,
U. S. District Judge.

[Endorsed]: Filed May 10, 1946. [5]

[Title of District Court and Cause.]

RETURN TO ORDER TO SHOW CAUSE

Comes now Arthur J. Phelan, as Acting District Director, United States Immigration and Naturalization Service, Port of San Francisco, California, and for cause why a writ of habeas corpus should not issue herein, shows:

I.

That the person in whose behalf the petition for writ of habeas corpus was filed, who is also known as Fong Haw (or Ho) Tan (or Ton) or Ong Ton, or Don Ton, is detained by respondent Arthur J. Phelan, as Acting District Director of United States Immigration and Naturalization Service, Port of San Francisco, California, under and by virtue of

a warrant of deportation duly and regularly issued on the 14th day of November, 1941, by the Attorney General of the United States after a hearing duly and regularly held before an Immigrant Inspector of the United States.

II.

That a true copy of said warrant of deportation and the original record of the entire proceedings pertaining thereto are annexed hereto and made a part hereof as Respondent's Exhibit "A".

Wherefore, Respondent prays that the petition for writ of habeas corpus herein be denied.

/s/ ARTHUR J. PHELAN,
Actg. District Director Immigration and Naturalization Service, Port of San Francisco, California.

[Endorsed]: Filed May 27, 1946. [6]

[Title of District Court and Cause.]

ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS

Upon the authority of Nishimoto v. Nagle, 44 Fed. 2d 304, Cir. 9, the petition for writ of habeas corpus is denied.

Dated: August 12, 1946.

LOUIS E. GOODMAN,
U. S. District Judge.

[Endorsed]: Filed Aug. 12, 1946. [7]

[Title of District Court and Cause.]

NOTICE OF APPEAL

To the Clerk of the above-entitled Court, to I. F. Wixon, District Director of Immigration and Naturalization, and to Frank J. Hennessy, Esq., United States Attorney, his attorney:

You and each of you will please take notice that Fong Haw Tan, the petitioner in the above-entitled matter, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit, from the order and judgment rendered, made and entered on August 12, 1946, denying the petition for a writ of habeas corpus filed herein.

Dated: September 10, 1946.

THOS. C. LYNCH,
WILLIAM J. CHOW,
Attorneys for Appellant.

[Endorsed]: Filed Sept. 10, 1946. [8]

[Title of District Court and Cause.]

PETITION FOR APPEAL

Comes now Fong Haw Tan, the appellant in the above-entitled matter, through his attorneys, Thomas C. Lynch and William J. Chow, Esqs., and respectfully shows:

That on the 12th day of August, 1946, the above-entitled Court made and entered its order denying

the petition for a writ of habeas corpus, as prayed for, on file herein, in which said order in the above-entitled cause certain errors were made to the prejudice of the appellant herein, all of which will more fully appear from the assignment of errors filed herewith.

Wherefore, the appellant prays that an appeal may be granted in his behalf to the United States Circuit Court of Appeals for the Ninth Circuit, for the correction of the errors as complained of, and further, that a transcript of the record, proceedings and papers in the above-entitled cause, as shown by the praecipe, duly authenticated, may be sent and transmitted to the said United States Circuit Court of Appeals for the Ninth Circuit, and further, that the said appellant be held within the jurisdiction of this Court during the pendency of the appeal herein, so that he may be produced in execution of whatever judgment may be finally entered herein.

Dated at San Francisco, California, September 1946.

THOS. C. LYNCH,
WILLIAM J. CHOW,
Attorneys for Appellant.

[Endorsed]: Filed Sept. 10, 1946. [9]

[Title of District Court and Cause.]

ASSIGNMENT OF ERRORS

Comes now the appellant, Fong Haw Tan, through his attorneys, Thomas C. Lynch and William J.

Chow, Esqs., and sets forth the errors he claims the above-entitled Court committed in denying his petition for a writ of habeas corpus, as follows:

I.

That the Court erred in not granting the writ of habeas corpus and discharging the appellant, Fong Haw Tan, from the custody and control of I. F. Wixon, District Director of Immigration and Naturalization Service for the Port of San Francisco.

II.

That the Court erred in not holding that it had jurisdiction to issue the writ of habeas corpus as prayed for in the petition on file herein.

III.

That the Court erred in not holding that the allegations set forth in the petition for a writ of habeas corpus were sufficient in law to justify the granting and issuing of a writ of habeas corpus.

IV.

That the Court erred in holding that a sentence to a fixed term of imprisonment of one year or more upon each of two or more counts of a single information or indictment, which sentence upon each and all of the counts of the single information or indictment was made to run concurrently, was a sentence to two or more separate and distinct terms of imprisonment of one year or more and was such

a sentence as to justify the deportation of the appellant. [10]

V.

That the Court erred in not holding that a sentence to a fixed term of imprisonment of one year or more upon each of two or more counts of a single information or indictment, which sentence upon each and all of the counts of the single information or indictment was made to run concurrently, was not a sentence to two or more separate and distinct terms of imprisonment of one year or more and was not such a sentence as to justify the deportation of the appellant.

VI.

That the Court erred in holding that a sentence to a term of life imprisonment upon each of the two counts of a single information or indictment, which sentence upon each and both of the counts of the single information or indictment was by operation of law made to run concurrently, was a sentence to two separate and distinct terms of imprisonment of one year or more and was such a sentence as to justify the deportation of the appellant.

VII.

That the Court erred in not holding that a sentence to a term of life imprisonment upon each of the two counts of a single information or indictment, which sentence upon each and both of the counts of the single information or indictment was

by operation or law made to run concurrently, was not a sentence to two separate and distinct terms of imprisonment of one year or more and was not a sentence as to justify the deportation of the appellant.

VIII.

That the Court erred in holding that the appellant had been sentenced more than once to a term of imprisonment of one year or more because of conviction of a crime or crimes involving moral turpitude within the meaning of the Immigration [11] Act of February 5, 1917, Section 19, (Section 155(a) Title 8 U.S.C.A.).

IX.

That the Court erred in not holding that the appellant had not been sentenced more than once to a term of imprisonment of one year or more because of conviction of a crime or crimes involving moral turpitude within the meaning of Immigration Act of February 5, 1917, Section 19, (Section 155(a) Title 8 U.S.C.A.).

Wherefore, appellant prays that the said order and judgment of the United States District Court for the Northern District of California made, given and entered herein in the office of the Clerk of said Court on the 12th day of August, 1946, denying the petition for a writ of habeas corpus, be reversed and that he be restored to his liberty and go hence without day.

Dated at San Francisco, California, September .., 1946.

THOS. C. LYNCH,
WILLIAM J. CHOW,
Attorneys for Appellant.

[Endorsed]: Filed Sept. 10, 1946. [12]

[Title of District Court and Cause.]

ORDER ALLOWING APPEAL

It appearing to the above-entitled Court that Fong Haw Tan, the petitioner herein, has this day filed and presented to the above Court his petition praying for an order of this Court allowing an appeal to the United States Circuit Court for the Ninth Circuit from the judgment and order of this Court denying a writ of habeas corpus herein and dismissing his petition for said writ, and good cause appearing therefor,

It is hereby ordered that an appeal be and the same is hereby allowed as prayed for herein; and

It is hereby further ordered that the Clerk of the above-entitled Court make and prepare a transcript of all the papers, proceedings and records in the above-entitled matter and transmit the same to the United States Circuit Court of Appeals for the Ninth Circuit within the time allowed by law; and

It is further ordered that the execution of the

warrant of deportation of the said Fong Haw Tan, the petitioner herein be and the same is hereby stayed pending this appeal; that he be not removed from the jurisdiction of this Court pending this appeal and that he be enlarged on bond in the amount of One Thousand ($1,000.00) Dollars pending this appeal.

LOUIS E. GOODMAN,
U. S. District Judge.

[Endorsed]: Filed Sept. 12, 1946. [13]

[Title of District Court and Cause.]

ORDER FIXING BOND ON APPEAL

It appearing that the petitioner has filed notice of appeal to the United States Circuit Court for the Ninth Circuit from the judgment and order entered in the above-entitled cause on August 12, 1946,

It is ordered that the amount of cost bond on said appeal herein be and hereby is fixed in the sum of Two Hundred and Fifty ($50.00) Dollars, conditioned as required by law and rule of this Court.

Dated: September 12th, 1946.

LOUIS E. GOODMAN,
U. S. District Judge.

[Endorsed]: Filed Sept. 12, 1946. [14]

[Title of District Court and Cause.]

ORDER TRANSMITTING ORIGINAL EXHIBITS

An appeal having been taken from an Order denying a petition for a writ of habeas corpus in the above-entitled cause.

It Is Hereby Ordered that the Immigration Records filed as exhibits herein, may be transmitted by the Clerk of the above-entitled Court to and filed with the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit to be taken as a part of the record on appeal in the above-entitled cause with the same force and effect as if embodied in the transcript of record and so certified by the Clerk of this Court.

Dated: September 12th, 1946.

LOUIS E. GOODMAN,
U. S. District Judge.

[Endorsed]: Filed Sept. 12, 1946. [15]

[Title of District Court and Cause.]

PRAECIPE

To the Clerk of the above-entitled Court:

Sir:

Please issue copies of following papers for transcript on appeal:

1. Petition for Writ of Habeas Corpus.
2. Order to Show Cause.

3. Return to Order to Show Cause.
4. Order denying petition for writ of habeas corpus.
5. Notice of Appeal.
6. Petition for Appeal.
7. Assignment of Errors.
8. Order Allowing Appeal. [16]
9. Order fixing bond on appeal.
10. Order transmitting original exhibits.
11. Praecipe.

/s/ WILLIAM J. CHOW,
/s/ THOS. C. LYNCH,
Attorneys for the Appellant.

[Endorsed]: Filed Oct. 7, 1946. [17]

District Court of the United States
Northern District of California

CERTIFICATE OF CLERK TO TRANSCRIPT OF RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing 17 pages numbered from 1 to 17, inclusive, contain a true, full, and correct transcript of the records and proceedings in the matter of Fong Haw Tan, on Habeas Corpus, No. 25492 G, as the same now remain on file and of record in my office.

I further certify that the cost of preparing and certifying the foregoing transcript of record on

appeal is the sum of $5.90 and that the said amount has been paid to me by the Attorney for the appellant herein.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at San Francisco, California, this 17th day of October A. D. 1946.

C. W. CALBREATH,
Clerk.

[Seal] /s/ E. H. NORMAN,
Deputy Clerk. [18]

In the United States Circuit Court of Appeals
for the Ninth District

Case No. 11447

FONG HAW TAN,

Appellant,

vs.

I. F. WIXON, District Director of U. S. Immigration Service,

Appellee.

DESIGNATION OF POINTS RELIED ON BY APPELLANT ON APPEAL

Comes now, Fong Haw Tan, the appellant in the above-entitled matter, through his attorneys, pursuant to rule 19, subdivision 6, of the rules of this court, hereby designates and states that he adopts

as his points to be relied on on appeal each and every one of the assignments of error included in the petition for review.

/s/ THOS. C. LYNCH
/s/ WILLIAM J. CHOW

[Title of Circuit Court of Appeals and Cause.]

APPELLANT'S DESIGNATION OF PARTS OF THE RECORD ON APPEAL THAT IS TO BE PRINTED

Comes now Fong Haw Tan, the appellant in the above-entitled matter, through his attorneys, Thomas C. Lynch and William J. Chow, Esqs., pursuant to rule 19, paragraph 6, of the rules of this court designates the part of the record on appeal to be printed as follows:

1. Petition for Writ of Habeas Corpus.
2. Order to Show Cause.
3. Return to Order to Show Cause, including Exhibit "A" attached thereto.
4. Order Denying Petition for Writ of Habeas Corpus.
5. Notice of Appeal.
6. Petition for Appeal.
7. Assignment of Errors.
8. Order Allowing Appeal.
9. Order Fixing Bond on Appeal.

10. Order Transmitting Original Exhibits.
11. Praecipe.

/s/ THOMAS C. LYNCH,
/s/ WILLIAM J. CHOW,
Attorneys for Appellant.

ACKNOWLEDGMENT OF SERVICE

Receipt of a copy of the foregoing appellant's Designation of Parts of the Record on Appeal that is to be printed.

/s/ FRANK J. HENNESSY,
U. S. Attorney,

/s/ EDGAR R. BONSALL,
Asst. U. S. Atty.,
Attorneys for Appellee.

[Endorsed]: No. 11447. United States Circuit Court of Appeals for the Ninth Circuit. Fong Haw Tan, Appellant, vs. Arthur J. Phelan, Acting District Director, Immigration and Naturalization Service, Port of San Francisco, California, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

Filed October 17, 1946.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

No. 11447

IN THE

United States Circuit Court of Appeals
For the Ninth Circuit

FONG HAW TAN,

Appellant,

vs.

ARTHUR J. PHELAN, Acting District Director, Immigration and Naturalization Service, Port of San Francisco, California,

Appellee.

Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division

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PROCEEDINGS HAD IN THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

United States Circuit Court of Appeals
for the Ninth Circuit

[Title of Cause.]

Excerpt from Proceedings of Friday,
May 16, 1947

Before: Stephens, Healy and Orr,
Circuit Judges

ORDER OF SUBMISSION

On Motion of Mr. Edgar Bonsell, Assistant United States Attorney, counsel for appellee, Ordered appeal herein submitted to the Court for consideration and decision on briefs on file.

United States Circuit Court of Appeals
for the Ninth Circuit

[Title of Cause.]

Excerpt from Proceedings of Wednesday,
June 25, 1947

Before: Stephens, Healy and Orr,
Circuit Judges

ORDER DIRECTING FILING OF OPINION AND CONCURRING OPINION AND FILING AND RECORDING OF DECREE

Ordered that the typewritten opinion and concurring opinion this day rendered by this Court in above cause be forthwith filed by the clerk, and that a decree be filed and recorded in the minutes of this court in accordance with the opinion rendered.

In the United States Circuit Court of Appeals
For the Ninth Circuit

No. 11,447

June 25, 1947

FONG HAW TAN,

Appellant,

vs.

ARTHUR J. PHELAN, Acting District Director, Immigration and Naturalization Service, Port of San Francisco, California,

Appellee.

Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division

Before: Stephens, Healy and Orr, Circuit Judges.

Stephens, Circuit Judge.

OPINION AND CONCURRING OPINION

Fong Haw Tan seeks release from custody of the acting District Director, Immigration and Naturalization Service, Port of San Francisco, California, by habeas corpus proceedings. After issuance of a show cause order, the court dismissed the petition, and petitioner appeals.

Appellant, a native of China, was admitted into this country in August, 1910, as a permanent resi-

dent, and has resided here ever since. On June 11, 1925, he was indicted for the murder of two persons in separate counts of the same bill. Therein he was charged with having committed both crimes on May 22, 1925. He was convicted on both counts by the same jury on July 25, 1925. Thereafter, a distinct and separate sentence of imprisonment in the state penitentiary for the term of his natural life was pronounced upon him upon each conviction. Both crimes involved moral turpitude. The point for decision involves construction of 8 U.S.C.A. § 155(a), the relevant part of which is set out in the margin.[1]

The Director claims that appellant has been sentenced twice in the circumstances required by the statute for deportation, while appellant claims that, giving full weight to the purpose of the act, he has been sentenced but once, and hence, having resided here more than five years before the crimes were committed, he is not subject to deportation.

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[1] 8 U.S.C.A. § 155(a): "* * * except as hereinafter provided, any alien, who, after May 1, 1917, is sentenced to imprisonment for a term of one year or more because of conviction in this country of a crime involving moral turpitude, committed within five years after the entry of the alien to the United States, or who is sentenced more than once to such a term if imprisonment, because of conviction in this country of any crime involving moral turpitude committed at any time after entry * * * shall, upon the warrant of the Attorney General, be taken into custody and deported * * *."

There were, as has been seen, two pronouncements of sentence upon two verdicts of guilty. Both were for imprisonment for life. In the nature of things the sentence cannot be served twice; hence, says appellant, there was but one sentence to serve.

The primary fault with appellant's reasoning is that the service of the sentence is taken as the basis for applying the statute, while nothing is said in the statute about service of the sentence. What the Congress had in mind was that one who accepts the hospitality of this free country should not violate its laws. After five law-abiding years, one law infraction of the nature defined in the statute would not be taken as wholly unfitting the alien for continued residence, but two or more such infractions would do so. It thus happens that deportation results from and because of the commission of the base deed. The sentence is but the official seal that the crime was committed by the alien.

The exact point was given close analysis by this court in Nishimoto v. Nagle, 44 Fed. 2d 304, and at p. 306 said: "The purpose of Congress undoubtedly was to provide for the deportation of a man who committed more than one offense involving moral turpitude for which he had been convicted and upon which conviction and sentence has been impressed; whether the sentences run concurrently or consecutively is entirely immaterial from the standpoint of the purpose of the law." Appellant, however, does not present his point without high authority, for, in considering the question where conviction

had been had on more than one count for arson and the same term of imprisonment had been adjudged for each count, all to run concurrently, the second circuit court said: "* * * it is a fiction to regard the covering of several offenses by a single penalty, as the imposition of the same imprisonment anew each time. Punishment consists of the pains endured, and the lapse of the term ends these; they cannot be exacted a second time." United States ex rel. Magnizzi v. Day, 51 Fed. 2d 1019, at 1021.

No exception to the philosophical statement can be taken, but giving it full application to the statute, we think it does not at all follow that an alien who has twice offended is not subject to deportation. It appears that the court was bearing too heavily upon what service of the sentences means to the convict. If the deportation was based upon the suffering the sentenced one must endure, then we would readily concede that in the service of cumulative sentences deportation would be based upon a fiction. But, as we have already said, the basis for the deportation is the alien's infraction of our laws.

Illustrations are given in the Magnizzi case of possible single offenses under the narcotic laws and counterfeit laws, which may result in multiple convictions of crimes and consequent sentences which would subject the guilty one to deportation. But these, in our opinion, do no more than to impose upon the trial judge an additional element for consideration in his tremendous responsibility of measuring justly due penalties.

Judge Sibley in Opolich v. Fluckey, 47 Fed. 2d 950, expresses his opinion on the point under consideration to the effect that concurring sentences pronounced for several related crimes closely connected in time as to their commission should be considered as one sentence. He interprets the purpose of the statute as one to rid the country of aliens who are habitual criminals. He says: "Technically he (the convict) committed four crimes, notwithstanding they were connected together and apparently in the same scheme of counterfeiting." The plurality of the pronouncement of sentences, each the same and all running concurrently, he deducts, is not proof of habitual criminality, and, therefore, such cases are not within the statute. The conclusion reached by this eminent jurist certainly presents difficulties: By what formula shall the permissible lapse of time between crimes be measured? How close must the crimes be related to each other? Must they derive from the same impulse? Do separate crimes of different natures committed to clear the way for a main objective come within the conclusion? The statute answers none of these obtruding questions.

It cannot be doubted that Congress desired to end our hospitality to aliens of criminal tendency, and supplementary to our penal laws, it notified them that they must obey our laws or be put out. In our opinion there is no harsh injustice involved that justifies a judicial search for a limitation of the plainly expressed scope of the statute. Within five

years of entry, one base act of the alien ends his permissive stay; after five years two base acts ends it.

Tassrai v. Schucker, 53 Fed. 2d 570, and Clark v. Okabona, 59 Fed. 2d 187, are in accord with our view. The latter case fully analyzes the Nishimoto and Magnizzi cases and follows the former.

Affirmed.

Healy, Circuit Judge, Concurring.

I have serious doubts whether Congress intended the deportation statute to apply to a case like this. I concur in the affirmance only for the reason that this court, in Nishimoto v. Nagle, 44 F. 2d 304, has already decided the point, and should, until higher authority has spoken, follow that decision.

[Endorsed]: Opinion and Concurring Opinion. Filed Jan. 25, 1947. Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals
for the Ninth Circuit

No. 11447

FONG HAW TAN,

Appellant,

vs.

ARTHUR J. PHELAN, Etc.,

Appellee.

JUDGMENT

Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

This Cause came on to be heard on the Transcript of the Record from the District Court of the United States for the Northern District of California, Southern Division and was duly submitted.

On Consideration Whereof, It is now here ordered and adjudged by this Court, that the order of the said District Court in this Cause be, and hereby is affirmed.

[Endorsed]: Filed and entered June 25, 1947.

United States Circuit Court of Appeals
for the Ninth Circuit

[Title of Cause.]

CERTIFICATE OF CLERK, U. S. CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT, TO RECORD CERTIFIED UNDER RULE 38 OF THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES

I, Paul P. O'Brien, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing thirty (30) pages, numbered from and including 1 to and including thirty, to be a full, true and correct copy of the entire record together with original immigration file, transmitted herewith of the above-entitled case in the said Circuit Court of Appeals, made pursuant to request of counsel for the appellant, and certified under Rule 38 of the Revised Rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

Attest my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 18th day of July, 1947.

[Seal] PAUL P. O'BRIEN,
Clerk.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed November 10, 1947

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(3617)

FILE COPY

In the Supreme Court

OF THE

United States

Supreme Court, U. S.
FILED
SEP 24 1947
CHARLES ELMORE CROPLEY
CLERK

OCTOBER TERM, 1947

No. 370

FONG HAW TAN,
Petitioner,

vs.

ARTHUR J. PHELAN, Acting District Director, Immigration and Naturalization Service, Port of San Francisco, California,
Respondent.

PETITION FOR WRIT OF CERTIORARI
to the United States Circuit Court of Appeals
for the Ninth Circuit
and
BRIEF IN SUPPORT THEREOF.

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